104

(4)

No. 07-1355

FILED
AUG 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

THE VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

CHARLES F. MARINO
ATTORNEY FOR THE VILLAGE OF MUNDELEIN, ILLINOIS
100 W. MONROE STREET
SUITE 902
CHICAGO, IL 60603
(312) 236-4260

LANI L. WILLIAMS
Counsel of Record
LOCAL GOVERNMENT LAWYER'S ROUNDTABLE
N67W32480 JORGENSON COURT
OCONOMOWOC, WI 53066
(262) 966-7438

LAWRENCE R. LALUZERNE
SMITH & LALUZERNE, LTD.
209 W. MADISON STREET, 2ND FLOOR
WAUKEGAN, ILLINOIS 60085-4345
(847) 775-7700

Attorneys for Petitioner

August 18, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY MEMORANDUM 1

TABLE OF AUTHORITIES

CASES

Burlington Northern and Santa Fe Ry. Co. v. Doyle,
186 F.3d 790 (7th Cir. 1999) 1, 2

Burlington Northern R.R. v. State of Mont.,
880 F.2d 1104 (9th Cir. 1989) 1

Columbus v. Ours Garage & Wrecker Service, Inc.,
536 U.S. 424 (2002) 3

Commonwealth v. New York Central Railroad Co.,
216 N.E.2d 870 (Mass. 1966) 3

CSX Transportation, Inc. v. Easterwood,
507 U.S. 658 (1992) 1, 2

Southern Pacific Transp. Co. v. Public Utilities Comm. of California,
647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd*,
820 F.2d 1111 (9th Cir. 1987) 1

Wisconsin Pub. Intervenor v. Mortier,
501 U.S. 597 (1991) 3

PETITIONER'S REPLY MEMORANDUM

As Wisconsin Central Railroad notes, the trial court found that the blocking of the grade crossing at issue in this case was within the railroad's control. Opp. at 4. Neither the Illinois Supreme Court, nor the Appellate Court of Illinois, disturbed this ruling. Instead, both courts found that the Village's ordinance was preempted in *all circumstances* by the express provisions of federal law because the Village's ordinance and the federal regulations "cover the same subject matter." Pet. App. at 17a, 45a.

State and federal regulations "cover the same subject matter" when they address *the same* safety concerns. *Burlington Northern R.R. v. State of Mont.*, 880 F.2d 1104, 1106 (9th Cir. 1989); (emphasis added); *see also Southern Pacific Transp. Co. v. Public Utilities Comm. of California,* 647 F. Supp. 1220, 1225 (N.D. Cal.1986), *aff'd,*820 F.2d 1111 (9th Cir. 1987) (per curiam), *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999). The safety concerns addressed by the federal and state regulations in this case are not the same. In its brief, Wisconsin Central Railroad asserts that the Illinois Supreme Court correctly applied this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1992) when it held that the Secretary of Transportation had issued regulations on the same safety concerns as the Village's ordinance. Wisconsin Central Railroad reads *Easterwood* too broadly.

In *Easterwood*, the complaint alleged that the train was traveling too quickly under the given circumstances. *Easterwood*, 507 U.S. at 675 n15. To

determine whether federal maximum speed limit regulations preempted tort claims based on excessive speed, this Court examined regulations dealing with grade crossings warning devices and determined that the regulations setting forth warning device requirements were enacted with an eye towards safety concerns based on train speed. *Easterwood* at 674. As such, the Court determined that maximum speed limits regulations "covered" tort claims based on excessive speed because the regulations together addressed safety concerns related to train speed. This Court's interpretation of what the regulations "covered" was quite narrow.

In contrast, the Illinois Supreme Court cobbled together regulations to create a broad interpretation that federal regulations governed "train movement," and on that basis preempted traditional local government health and safety regulation requiring that grade crossings be cleared, when possible, to accommodate the free flow of traffic. While determining the safety concerns at which a federal requirement is aimed may require some level of generalization, too much generalization results in meaningless analysis. With too much generalization, federal regulations become all encompassing. *See Doyle*, 186 F.3d at 796. To assert that the regulations dealing with brake testing, speed, and grade signal systems regulate "train movement," is an example of a court engaging in too much generalization.

Wisconsin Central Railroad's opposition errs in two other respects. First, the opposition suggests that due to recent amendments to the FRSA this case is not appropriate for review. Opp. at 12 n5. However, as

Wisconsin Central Railroad itself notes, the amendment does not affect this case. In fact, the statutory language at issue in this case has not changed at all and the Court would be interpreting the current language of the statute.

Second, Wisconsin Central Railroad is incorrect that there are other alternative grounds for affirming the Illinois Supreme Court. Opp. at n.3. It is critical to remember that the FRSA savings clause would only be reached if this Court determined that federal regulations covered the same subject matter as the Villages ordinance. If that point is reached, the Village explained that the Illinois Supreme Court erred when it determined that the ordinance violates the Commerce Clause and its holding on this point is in conflict with *Commonwealth v. New York Central Railroad Co.*, 216 N.E.2d 870 (Mass. 1966). And, while the Illinois Supreme Court did not reach the issue of whether the Village is entitled to regulate under the FRSA, this Court has previously held that the term "State" in federal statutes encompasses local governments. *See, Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991).

The majority of states have laws prohibiting the blocking of grade crossings beyond a certain amount of time, if it is within the control of the railroad to move along. Children should not to have to crawl over or under trains on a regular basis to get to school, yet they do. Public safety personnel should not to be forced to find alternate routes, if available at all, to respond to emergency calls, yet they must. The commercial and general life activities of whole towns should not to

come to a standstill as trains block crossings when they have reasonable control to move through the crossings, yet that is the case. Federal law should not aid in the creation of these situations.

Federal law should not preempt traditional local authority to regulate thoroughfares for the purpose of protecting local health and safety on the basis of generalities, when this Court's precedents require that express preemption be applied narrowly.

The Village of Mundelein respectfully requests that its petition be granted.

Respectfully submitted,

LANI L. WILLIAMS
(*COUNSEL OF RECORD*)
LOCAL GOVERNMENT LAWYER'S ROUNDTABLE
N67W32480 JORGENSON COURT
OCONOMOWOC, WI 53066
(262) 966-7438

LAWRENCE R. LALUZERNE
SMITH & LALUZERNE, LTD.
209 W. MADISON STREET, 2ND FLOOR
WAUKEGAN, ILLINOIS 60085-4345
(847) 775-7700

CHALRES F. MARINO
ATTORNEY FOR THE VILLAGE OF
MUNDELEIN, ILLINOIS
100 W. MONROE STREET
SUITE 902
CHICAGO, IL 60603
(312) 236-4260

Counsel for Petitioner